**U.S. Department of Labor** Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

**Date:** May 30, 2001

**Case No.:** 2001-TLC-6

***In the Matter of:***

GARBER FARMS,
Employer.

BEFORE: Thomas M. Burke
Associate Chief Administrative Law Judge

## *DECISION AND ORDER*

This is an expedited review requested on May 15, 2001 by Garber Farms ("Employer"), of the decision by a U.S. Department of Labor Certifying Officer ("CO") denying Employer's application for temporary alien agricultural labor.

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(15)(H)(ii)(a) (hereinafter referred to as "the Act"), and its implementing regulations, found at 20 C.F.R. Part 655 (hereinafter referred to as "the Regulations").[1] This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. § 655.112(a)(2). On May 22, 2001 this Office received the AF and on May 23, 2001 the parties were notified that all additional submissions must be received by May 25, 2001. The parties timely submitted all additional briefs and supporting documentation.

## *Statement of the Case*

Employer filed its H-2A application (ETA Case No. T2001-OH-05395254) with the Region V Regional Administrator of the U.S. Department of Labor, Employment and Training Administration on March 13, 2001 (AF 29-39). In this application, Employer sought to fill eight (8) positions, described as "Farmworker, Vegetable II," pursuant to the definition in the Dictionary of Occupational Titles ("DOT"), 402.687-010. The CO reviewed this application and on May 9, 2001, denied it in part for certain deficiencies in the recruitment process (AF 2–5).[2]

[1]Unless otherwise noted, all regulations cited in this Decision and Order are in Title 20.

[2]Certification was granted for five (5) of the job opportunities (AF at 2).

In particular, the denial states that Employer failed to inform the order-holding Local Office that the date of need was changed from May 1, 2001 to May 10, 2001.[3] Further, the CO states in the denial that Employer discouraged applicant Rincones from taking the job offer by telling him that he would not be comfortable working for Employer since he did not speak Spanish like the majority of the other workers.[4] CO also states that Employer discouraged applicants Malacara and Ibarra from accepting the job offer by changing the start date of employment and making certain statements regarding unemployment insurance (AF 2-5). Consequently, CO denied certification for three of the job opportunities because of Employer's failure to comply with the recruitment requirements under 20 C.F.R. §§ 655.105(a) and 655.105(d).

On May 15, 2001 this Office received Employer's request for an expedited administrative review of the application pursuant to 20 C.F.R. § 655.104(c). In support of this request, Employer states that during the interview process applicant Ricones expressed concern that applicant Ibarra and Malacara did not speak English and that he would have to share living space with them. Employer also states that on April 30, 2001 when applicant Rincones was contacted to make travel arrangements, applicant Rincones asked if anyone in the living quarters could speak English. Employer stated that he believed that applicant Rincones would likely be the only English speaking person. According to Employer, applicant Rincones expressed an interest in the work, but declined the offer because he did not want to live with others who did not speak English.

In further support of this request for review of the denial, Employer states that during the interview process, applicant Malacara asked if Employer carried unemployment insurance. Employer told applicant Malacara that he did not currently have unemployment insurance, but that Employer "would look into what was required" to provide it. Employer states that applicants Malacara and Ibarra declined the job offers when contacted to make travel arrangements, but gave no reasons at that time. In conclusion, Employer states that the applicants made their decisions to turn down the employment offers based on answers to questions they asked and that if the denial is upheld, Employer will be forced to reduce production by thirty percent.

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[3]On April 25, 2001, Employer was scheduled to conduct on-site interviews with U.S. workers who were referred to Employer's job order through the McAllen, Texas Local Office. Of the thirteen workers scheduled for interviews, only eight arrived for the interview. During the first interview and in the presence of the Local Office job interviewer, Employer changed the date of need from May 1, 2001 to May 10, 2001. This interview was suspended and Employer was notified by the Chicago Regional Office that changing the date of need during the interview process violated section 653.501 which requires 10 days prior written notification of such a change. Employer was further advised that changing the date during the interview process could be viewed as discouraging interested applicants and that all U.S. workers must be offered the same terms of employment as the alien labor applicants (AF at 3-4).

[4]CO also states that Employer told applicant Ricones that he should not take the job because Employer was worried about his safety and his ability to perform the duties for a job he had never done before (AF at 4).

Subsequent to the denial of this certification application and the refusal to accept the positions by the three aforementioned applicants, on May 15, 2001, Employer offered the positions to three U.S. workers from Tennessee (AF at 6). All three workers accepted the job and began working for Employer. In light of this, CO argued in the brief submitted to this Office that Employer's appeal should be considered moot. However, subsequent to the submission of CO's brief in support of the partial denial of certification received in this Office on May 25, 2001, Employer contacted this Office and stated that all three U.S. workers terminated their employment as of May 25, 2001. Thus, CO's contention that this proceeding is moot, is hereby rejected and this review will be decided on the merits.

***Discussion***

Based upon the record, there are two issues to be resolved in this matter. First, whether Employer failed to comply with the Act and Regulations by discouraging applicant Rincones from accepting the position by telling him that Employer worried about his safety, was concerned about his ability to do the work, and whether he would be comfortable living with others who did not speak English. Second, whether Employer failed to comply with the Act and Regulations by changing the start date of employment and stating to applicants Malacara and Ibarra that he did not have unemployment insurance for his workers.

The regulations provide that where an application for temporary labor certification has otherwise satisfied all the requirements under the Act, the employer must engage in the positive recruitment of U.S. workers until the date the H-2A workers depart for employer's place of work. 20 C.F.R. §§ 655.103(d), 655.105(a), 655.105(d). Section 655.105(d), as part of the positive recruitment and certification process, provides that the RA must make a final determination as to whether the employer has satisfied the recruitment assurances in § 655.103. As within other sections of the Act, positive recruitment of U.S. workers requires that such recruitment be conducted in good faith, thus, employers seeking labor certification must not discourage U.S. workers from seeking advertised positions. *See Peri & Sons Farms, Inc.*, 1994-TLC-6, (Aug. 15, 1994) (recruitment must be done in good faith); *Mountain Plains Agriculture Services/J.P. Werner & Sons Inc.*, 1995-TLC-3 (Feb. 8, 1995) (employer must make good faith test of U.S. worker availability); *Midland Livestock Co. & Sheepherders*, 1988-TLC-6 (Feb. 22, 1988) (full compliance with the requirements of 20 C.F.R. §§ 101-102 is the minimum necessary to demonstrate that employer has by reasonable means made a good faith effort to test availability of U.S. workers). The burden of proof in alien certification remains with Employer to establish that the individuals referred are not able, willing, qualified, or eligible because of lawful job-related reasons. 20 C.F.R. § 655.106(h)(2)(i).

Applicant Rincones

Employer has failed to establish that the recruitment of applicant Rincones was conducted in good faith and that applicant Rincones was unwilling to accept the position for lawful job-related reasons. Employer cannot discourage an applicant from accepting a position where the applicant has the requisite skills listed in the certification. *See Mountain Plains*, 1995-TLC-3 at p. 4. In *Mountain Plains*, employer sought certification for a livestock worker on a ranch. The worker was required to have various skills including assisting in the delivery of offsprings as

well as prior experience of a least six months as a livestock worker. The ALJ affirmed the CO's denial of certification because the employer discouraged an otherwise qualified applicant from taking the job because "she probably couldn't do it" and because it would be difficult since she was a woman and would have to sleep in the bunkhouse.

Similar to the employer in *Mountain Plains*, the Employer here discouraged an otherwise qualified applicant for unlawful non-job related reasons. Employer asserts when he contacted applicant Rincones on April 30, 2001 to make travel arrangements, applicant Rincones rejected the offer after learning that he would be the only person speaking English in the living quarters. Employer states that applicant Rincones initiated the conversation regarding the languages spoken by other workers during the interview on April 25, 2001 and again over the telephone on April 30, 2001 (AF at 1).

Conversely, applicant Rincones stated that on April 30, 2001, Employer told him that, "for his safety," he should not take the job. Applicant Rincones also stated that Employer expressed concern about his ability to do the job since he had not done this type of work before. Finally, according to applicant Rincones, Employer told him that he would not feel comfortable working and living with people who do not speak English (AF at 50). Employer readily admits that he engaged in these conversations with applicant Rincones and only offers, as rebutting evidence, the bare assertion that applicant Rincones initiated the conversation regarding job skills required and the language spoken by the other workers.

However, the evidence establishes that no education, training or experience was required to perform the job duties (AF at 12). As such, even assuming applicant Rincones initiated the discussion of the skills required to perform the job, Employer did nothing to quell any concerns applicant Rincones may have had about his qualifications for the position, despite the fact that Employer listed no required skills or experience as necessary for the job. While Employer indeed may not have intended to actively discourage applicant Rincone from rejecting the job offer for this reason, Employer's conduct during the interview process and again on the telephone had the effect of discouraging applicant Rincones from accepting the position. Consequently, since Employer has offered no substantial evidence to contradict applicant Rincones' recount of the recruitment process, the CO's finding that Employer failed to engage in good faith positive recruitment and partial denial of certification is affirmed as Employer cannot establish that the applicant was not able, willing, qualified or eligible because of lawful job related reasons.

Applicants Malacara and Ibarra

Employer has failed to establish that the recruitment of applicants Malacara and Ibarra was conducted in good faith and that the applicants were not able, willing, qualified or eligible because of lawful job related reasons. Under the Act, the RA shall not grant a temporary alien labor certification request if the RA determines that the employer has not satisfactorily complied with the positive recruitment requirements. 20 C.F.R. § 655.106(b)(1)(v). In turn, section 655.101(b)(1) provides that all job offers made pursuant to temporary alien agricultural labor certification applications shall comply with the recruitment assurances in § 655.103 and 653.501. The assurances found under section 653.501 provide, in part, that the employer will provide workers referred through the Clearance Order the hours indicated in the Clearance Form for the

week beginning with the date of need stated on the Order, "**unless the employer has amended the date of need at least 10 working days prior**" to the original date of need by notifying the local office. 20 C.F.R. § 653.501(d)(2)(v)(A) (emphasis added).

In this case, Employer was scheduled to conduct on-site interviews with U.S. workers on April 25, 2001. During the course of the first interview, only three working days before the date of need specified on Clearance Form, Employer changed the date of need from May 1, 2001 to May 10, 2001. Employer was advised of the requirement to provide prior notice and that changing the date during the interview process could be viewed as discouraging interested applicants (AF at 3-4). Employer failed to pay heed to this advice and indeed, applicants Malacara and Ibarra declined to accept the job offer from Employer at least in part because of the new date of need (AF at 5). Therefore, since Employer failed to provide 10 days prior notice of the change in date of need as required by section 653.501, CO properly denied certification pursuant to section 655.106(b)(1)(v) and such denial is hereby affirmed.

Accordingly, the Regional Administrators' denial of temporary alien agricultural labor certifications is hereby **AFFIRMED**.

**SO ORDERED.**

Washington, DC
TMB/cmt

THOMAS M. BURKE
Associate Chief Judge